BAP No. 20-1208
Case No. 6:13-bk-30625-MH
Adversary No. 6:18-ap-01089-MH

UNITED STATES COURT OF APPEALS
BANKRUPTCY APPELLATE PANEL
FOR THE NINTH CIRCUIT

In re: John Martin Mata and Livier Mata,

Debtors.

John Martin Mata,

Plaintiff-Appellant,

v.

National Collegiate Student Loan Trust 2006-1, 2006-4, 2007-1,

Defendants-Appellees.

Appeal from the Judgment of the United States Bankruptcy Court for the Central District of California, Riverside, The Honorable Mark D. Houle, Judge
Adversary No. 6:18-ap-01089-MH

OPENING BRIEF OF PLAINTIFF-APPELLANT

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CERTIFICATION REQUIRED BY BAP RULE 8015(a)-1(a)

In re: John Martin Mata, BAP No. CC-20-1208

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

1. John Martin Mata: Plaintiff-Appellant
2. Livier Mata: Plaintiff-Appellant's Co-Debtor in Bankruptcy
3. National Collegiate Student Loan Trust 2006-1: Defendant-Appellee
4. National Collegiate Student Loan Trust 2006-4: Defendant-Appellee
5. National Collegiate Student Loan Trust 2007-4: Defendant-Appellee
6. Meredith A. Jury: Counsel for Plaintiff-Appellant
7. M. Erik Clark: Counsel for Plaintiff-Appellant
8. Kathryn J. Johnson: Counsel for Plaintiff-Appellant
9. Austin C. Smith: Counsel for Plaintiff-Appellant
10. James Schultz: Counsel for Defendants-Appelleess
11. Damian Richard: Counsel for Defendants-Appellees
12. Transworld Systems Inc.: Servicer for Defendants-Appellees

Dated: October 12, 2020

/s/ M. Erik Clark
M. Erik Clark
Attorney for Plaintiff-Appellant

CERTIFICATION REQUIRED BY BAP RULE 8015(a)-1(b)

In re: John Martin Mata, BAP No. CC-20-1208

The undersigned certifies that the following are known related cases and appeals before the United States Court of Appeals, the Bankruptcy Appellate Panel, or the United States District Court:

None.

Dated: October 12, 2020

/s/ M. Erik Clark
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INTRODUCTION

This appeal seeks to reverse a decision that would further amplify the current student loan crisis in the United States. Plaintiff-Appellant, John Mata ("Mata" or "Plaintiff"), appeals the Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment ("Decision"), issued by the Honorable Mark Houle of the United States Bankruptcy Court for the Central District of California ("Bankruptcy Court"), which held that Mata's debts to Defendants-Appellees—three of seventeen Delaware statutory trusts that own more than 800,000 private student loans (collectively, the "Trusts")[1]—were excepted from discharge under 11 U.S.C. § 523(a)(8) ("Section 523(a)(8)"). AER 028.001.[2]

Specifically, the Bankruptcy Court agreed with the argument espoused by the Trusts that Mata's debts are non-dischargeable as loans guaranteed by a now defunct "nonprofit" corporation, and therefore subject to Section 523(a)(8)(A)(i) as "educational loan[s] made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." Rather than interpreting the statute narrowly and in favor of discharge,

[1] The Trusts include National Collegiate Student Loan Trust 2006-1 ("2006-1 Trust"), National Collegiate Student Loan Trust 2006-4 ("2006-4 Trust"), and National Collegiate Student Loan Trust 2007-4 ("2007-4 Trust").

[2] References to Plaintiff-Appellant's Excerpts of Record shall be in the form "AER XXX.YYY" with "XXX" referencing the document number and "YYY" referencing the page number.

the Bankruptcy Court concluded that by using the term "funded" in Section 523(a)(8)(A)(i), Congress intended to protect from discharge any educational loan to which a "nonprofit" corporation—in this case, The Educational Resources Institute, Inc. ("TERI")—made "any meaningful contribution."

Section 523(a)(8)(A)(i) contains two discharge exceptions. The first, referencing guaranteed loans, applies only to debts for loans guaranteed by a governmental unit. The second, referencing loans "made under any program funded in whole or in part by a … nonprofit institution" does not use the word "guaranteed," and was intended to apply to debts for loans made under the National Direct Student Loan Program, protecting from discharge debts for loans made directly to students by nonprofit colleges and universities, funded either partially or wholly by the government.

The cases that interpreting Section 523(a)(8)(A)(i) broadly are, respectfully, in error. Those decisions disregard basic canons of statutory interpretation, holding that "program" means a marketing platform, "funded" means "played any meaningful part," and "nonprofit institution" means any 501(c) corporation.[3] But Congress was not so careless in its selection of words when drafting Section 523(a)(8)(A)(i). The words "program," "funded," and "nonprofit institution" were

[3] *See In re Pilcher*, 149 B.R. 595, 600 (B.A.P. 9th Cir. 1993); *In re Hammarstrom*, 95 B.R. 160, 165 (Bankr. N.D. Cal. 1989).

purposely selected by Congress as the building blocks for constructing the lending programs under Title IV of the Higher Education Act ("HEA").[4] Once read in conformity with the HEA, it is clear that debts like Mata's are not excepted from discharge under Section 523(a)(8)(A)(i).

Even if the Bankruptcy Court's statutory construction were sound, the evidence below shows there is a genuine issue of material fact as to whether TERI guaranteed the loans that form the basis of Mata's debts and whether TERI was a legitimate nonprofit. As to whether TERI guaranteed the loans at issue, the Bankruptcy Court failed to recognize that the TERI guaranties were voided in TERI's bankruptcy prior to Mata defaulting on the loans and filing bankruptcy. Despite implicitly relying on Mata's bankruptcy petition date for the purposes of its conclusion that TERI "funded," the loans, the Bankruptcy Court applied the loans' origination date to conclude the loans were guaranteed by TERI. The evidence also indicates TERI did not actually guarantee the loans. As to TERI's status as a nonprofit, the Bankruptcy Court failed to inquire whether it was operated for charitable or commercial purposes,[5] and financial records suggest

[4] *In re Murphy*, 282 F.3d 868, 872 (5th Cir. 2002) (stating Section 523(a)(8) should be harmonized with the HEA).

[5] *In re Golden*, 596 B.R. 239, 266-67 (Bankr. E.D.N.Y. 2019) (categorizing as a question of fact whether TERI was "a *bona fide* nonprofit institution" or a division of FMC).

TERI was a commercial mechanism for the profitability of The First Marblehead Corporation ("FMC").

For these reasons and those below, this Court should reverse the Decision of the Bankruptcy Court to preserve the fundamental purposes of the Bankruptcy Code.

STATEMENT OF JURISDICTION

The Bankruptcy Court has jurisdiction over the adversary proceeding pursuant to 28 U.S.C. §§ 157(a) & (b)(2)(I), 1332, and 1334(b) because it arises under and is related to a case under Title 11 and seeks a dischargeability determination. The Bankruptcy Court entered its Decision and Judgment on July 31, 2020. AER 027.001; AER 028.001-028.019. Plaintiff timely filed his Notice of Appeal on August 14, 2020 as prescribed by Fed. R. Bankr. P. 8002. AER 029.001-029.003. The appeal is from a final judgment, such that the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") has jurisdiction over the matter pursuant to 28 U.S.C. § 158(a)(1), (b)(1), & (c)(1).

ISSUES PRESENTED FOR REVIEW

I. Whether the Bankruptcy Court erred in concluding that Section 523(a)(8)(A)(i) excepts from discharge debts for loans guaranteed by nonprofit corporations.

II. Whether the Bankruptcy Court erred in determining there was no genuine issue of material fact as to whether TERI guaranteed the loans at issue and was a nonprofit institution.

STANDARD OF REVIEW

I. The bankruptcy court's interpretation of statutory law and application of the legal standard in determining whether a student loan debt is dischargeable is reviewed de novo. *In re Christoff*, 527 B.R. 624, 628 (B.A.P. 9th Cir. 2015) (citing cases).

II. The bankruptcy court's grant of summary judgment is reviewed de novo. *Id.* (citing cases).

STATEMENT OF CASE

I. Section 523(a)(8) of the Bankruptcy Code and the Higher Education Act

Not all student loan debt is protected from discharge in bankruptcy; some is dischargeable. This case concerns that type of debt. Section 523(a)(8) of the Bankruptcy Code excepts only certain educational debts from discharge and reads:

> (a) A discharge … does not discharge an individual debtor from any debt —
>
> …
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for —
>
> (A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in

> part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual[.]

11 U.S.C. § 523(a)(8). This appeal concerns Section 523(a)(8)(A)(i).

A review of the HEA sheds light on the current version of Section 523(a)(8)(A)(i), as Congress used the same language in codifying each. The federal government began lending money to students in the 1960s and 1970s under two major lending programs authorized by the HEA,[6] each structured differently: the Guaranteed Student Loan ("GSL") Program,[7] and the National Direct Student Loan ("NDSL") Program (collectively, the "Title IV Programs").[8] GSLs were originated by private banks but insured and guaranteed by the federal government.[9] NDSLs,

[6] Federal financing of higher education technically began with the GI Bill after World War II. *See* Matthew Fuller, *A History of Financial Aid to Students*, 44 Journal of Student Financial Aid 4 (2014).

[7] The GSL Program ultimately became the Federal Family Education Loan ("FFEL") Program, which ended in 2010. All new loans were originated directly from the Department of Education.

[8] *Matter of Williamson*, 25 B.R. 49, 52 (Bankr. M.D. Ga. 1982) (discussing NDSL Program). The NDSL ultimately became the Perkins Loan. *See* 20 U.S.C. § 1087gg.

[9] *See* 20 U.S.C. § 1071(a)(1)(D). The GSL Program was an umbrella term for four different programs whose loans were either guaranteed by the government or reinsured. *Oliver Sch., Inc. v. Foley*, 881 F. Supp. 847, 850 (W.D.N.Y. 1994), *aff'd,* 52 F.3d 310 (2d Cir. 1995); *Becirevic v. Navient Sols., LLC*, No. 18-CV-363,

on the other hand, were made by schools themselves, drawing upon a revolving fund of money that was in part supplied by the school and in part (and primarily) supplied by the federal government. *See Inter-Am. Univ. of Puerto Rico, Inc. v. Concepcion*, 716 F.2d 933, 934 (1st Cir. 1983). In order to ensure this money was available for future generations, Congress enacted Section 523(a)(8) in 1978 to protect the two entities involved in student lending—the government and the schools. The original version of the statute as added by the Bankruptcy Reform Act of 1978 read as follows:

> (a) a discharge . . . does not discharge an individual debtor from any debt—
> (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan.

Act of Nov. 6, 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549 (codified at 11 U.S.C. § 523(a)(8) (1979) (prior to 1979 amendment)) ("1978 version").[10] As written, Section 523(a)(8) was intended to capture both Title IV Programs: GSLs were owed "to a governmental unit" and NDSLs were owed to a "nonprofit institution of higher education."

The 1978 version of Section 523(a)(8) was insufficient protection for the federally subsidized loans, however. While Congress agreed that Section 523(a)(8)

2019 WL 4046770, at *1 (E.D. Tex. May 30, 2019), *report and recommendation adopted,* 2019 WL 4253940 (E.D. Tex. Sept. 9, 2019).

[10] *See also In re Southard*, 2 B.R. 124, 126 (Bankr. W.D. Va. 1979).

would cover all GSLs and NDSLs, the 1978 version as written would only except from discharge GSLs and NDSLs owed directly to governmental units or nonprofit institutions of higher education. Because the federal government did not originate debt under the GSL Program, but instead guaranteed debt originated by private lenders such as commercial banks, borrowers could discharge GSLs by declaring bankruptcy before defaulting, which would prevent the assignment of the GSL to the federal government. Thus, the debt was not owed to a "governmental unit."[11] Similarly, because NDSLs were not made or guaranteed by the government, but made using funds provided by the government by four types of "institutions" (nonprofit and for-profit colleges and secondary and post-secondary trade schools),[12] borrowers who attended for-profit colleges, vocational institutions, or trade schools could discharge their NDSLs prior to default because their debts were not owed to a "governmental unit" or "nonprofit institution of higher education."

[11] For a comprehensive history of the amendments, *see In re Adamo*, 619 F.2d 216, 220 (2d Cir. 1980), and the Congressional record, S. Rep. 96-230 (1979).

[12] *St. George's Univ. Sch. of Med. v. Bell*, 514 F. Supp. 205, 206 (D.D.C. 1981) ("The definition of a 'institution for higher education' requires … that the institution 'is accredited by a nationally recognized accrediting agency or association', … and 'is a public or other nonprofit institution[.]'").

Based on the gaps in the 1978 version,[13] Congress rewrote Section 523(a)(8) in 1979 to focus on the character of the loans:

> (a) a discharge … does not discharge an individual debtor from any debt—
> (8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education.

Pub. L. 96-56, § 523(a)(8), 93 Stat. 387 (codified as amended at 11 U.S.C. § 523(a)(8) (1979)) ("1979 version"); *see also Matter of Williamson*, 665 F.2d 683, 684 (5th Cir. 1982). The 1979 version perfectly tracked the mechanics of the Title IV Programs—the first clause protected the GSL and the second clause protected the NDSL and the language was directly taken by Congress from Title IV.[14]

In 1984, one minor change was made to present day Section 523(a)(8)(A)(i), but it was not intended to drastically alter the substance of the exceptions to discharge. During the early 1980s, the Circuits wrestled with the question of

[13] These gaps are discussed in the 1979 Congressional record advocating for amendment of Section 523(a)(8). *See* S. Rep. 96-230, at 1-2 (1979).

[14] *In re Yee*, 7 B.R. 747, 751 n.5 (Bankr. E.D.N.Y. 1980) ("Two major loan programs, the [NDSL] and the [GSL], currently make funds available for higher education. The former … enables a student to borrow directly from an institution's loan fund, which is supported by federal and institutional contributions. ... Under the GSL program, the student borrows money from a qualifying lender, and the guarantee agency, either the Federal government, a state agency or a private nonprofit organization, endorses the loan.") (citations omitted).

whether a seminary fell within the scope of "higher education."[15] In response, and to end to such litigation, Congress amended Section 523(a)(8) to clarify its scope by omitting "of higher education."[16] The statute then read:

> (a) a discharge … does not discharge an individual debtor from any debt—
> (8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution.

11 U.S.C. § 523(a)(8) (1984). Congress amended other aspects of Section 523(a)(8) over the next three decades. Notwithstanding smaller alterations, and larger changes for the "undue hardship" timeline, the language in the 1984 version of Section 523(a)(8) is essentially the current version of Section 523(a)(8)(A)(i).

II. Factual Background

Mata attended Loma Linda University ("LLU") for his graduate studies in counseling from 2005 through 2007. AER 001.009. In addition to taking out federal loans to fund his post-graduate education, AER 015.114, Mata applied for and received an additional $90,000 funded by Charter One Bank, N.A. ("Charter

[15] *See Beth Rochel Seminary v. Bennett*, 825 F.2d 478, 481 (D.C. Cir. 1987); *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 279 (5th Cir. 1981).

[16] *See* Act of July 10, 1984, Pub. L. No. 98-353, § 454(a) 98 Stat. 33311 (amending 11 U.S.C. § 523(a)(8)). *See also Bankruptcy Improvements Act: Hearing on S. 333 and S. 445 Before the S. Comm. On the Judiciary*, 98th Cong. 1, 328-29 (1983) (statement of Professor Frank R. Kennedy, Univ. of Mich. Sch. of Law, Ann Arbor, Mich.), 1983 WL 506604, at 172-73 (AER 008.038-AER 008.039).

One") via three direct-to-consumer loans outside the LLU financial aid office (the "Loans"). AER 001.009-001.010. The three Loans were originated as follows:

(1) A Next Student Graduate Loan was applied for in the amount of $30,000 on January 2, 2006 and received on or around January 6, 2006 ("Next Student 2006 Loan"). AER 004.035, 004.041. The principal amount of the note was $33,519.55, inclusive of an origination fee, with an interest rate of 9.938%. AER 004.041. At origination, the total payments (if timely made) were projected at $91,929.60. *Id.* The note states that the Next Student 2006 Loan is guaranteed by TERI. AER 004.037.

(2) An Astrive Graduate Loan was applied for in the amount of $30,000 on September 26, 2006 and received around September 29, 2006 ("Astrive Loan"). AER 004.080, 004.086. The principal amount of the note was $32,786.89, inclusive of an origination fee, with an interest rate of 12.149%. AER 004.086. At origination, the total payments (if timely made) were projected at $104,899.20. *Id.* The note states that the Astrive Loan may be guaranteed by TERI. AER 004.082.

(3) A Next Student Graduate Loan was applied for in the amount of $30,000 on August 8, 2007 and received on or around August 21, 2007 ("Next Student 2007 Loan"). AER 004.121, 004.127. The principal amount of the note was $33,519.55, inclusive of an origination fee, with an interest rate of 14.003%. AER 004.127. At origination, the total payments (if timely made) were projected at $121,593.60. *Id.* The note states that the Next Student 2007 Loan may be guaranteed by TERI. AER 004.123.

Collectively, the total payments on the Loans funded by Charter One were projected to cost Mata $318,422.40—over 350% more than the amount received. Charter One entered into a Guaranty Agreement with TERI on May 15, 2002 for TERI to guarantee loans originated under the NextStudent Loan Program ("NextStudent Guaranty"), AER 006.004-006.107, and another Guaranty Agreement with TERI was executed on March 25, 2004 for loans originated under the START Education Loan Program ("START Guaranty" and, collectively, the

"Guaranty Agreements"). AER 006.109-006.254. There is no specific reference to Mata's Loans in either Guaranty Agreement.

The Trusts purportedly purchased the Loans. AER 004.008. The documents evidencing this transfer of ownership demonstrate:

(1) The Next Student 2006 Loan was allegedly subject to a Note Purchase Agreement ("NPA") dated May 15, 2002 between FMC and Charter One. AER 004.060-004.061. The NPA was incorporated into a Pool Supplement ("Pool") between FMC and Charter One dated March 9, 2006, transferring all referenced loans to The National Collegiate Funding LLC ("National Collegiate"). AER 004.057-004.061. On March 9, 2006, a Deposit and Sale Agreement ("DASA") was executed between National Collegiate and the 2006-1 Trust. AER 004.062-004.075. That DASA purports to transfer to the 2006-1 Trust all of the loans from the March 9, 2006 Pool between FMC and Charter One, as well as all of the loans subject to the May 15, 2002 NPA between FMC and Charter One. AER 004.071, 004.074.

(2) The Astrive Loan was allegedly subject to a Pool between FMC and Charter One dated December 7, 2006. AER 004.101-004.104. However, there is no referenced NPA between FMC and Charter One for Astrive loans in the Pool. AER 004.102-004.103. On December 7, 2006, a DASA was executed between National Collegiate and the 2006-4 Trust. AER 004.105-004.115. It purports to transfer to the 2006-4 Trust all loans from the December 7, 2006 Pool (and references the Astrive loans as having been part of that Pool despite their exclusion), as well as loans subject to a March 25, 2004 NPA for Astrive loans between FMC and Charter One. AER 004.111, 004.114.

(3) The Next Student 2007 Loan was also allegedly subject to the May 15, 2002 NPA but was incorporated into a later Pool dated September 20, 2007 between FMC and RBS Citizens, N.A. ("RBS"), successor to Charter One. AER 004.141-004.146. The Pool transferred all referenced loans to National Collegiate. *Id.* On September 20, 2007, a DASA was executed between National Collegiate and the 2007-4 Trust. AER 004.147-004.156. That DASA purports to transfer to the 2007-4 Trust all of the loans from the September 20, 2007 Pool between FMC and RBS,

> as well as all of the loans subject to the May 15, 2002 NPA between FMC and Charter One. AER 004.153, 004.155.

Notwithstanding a Roster sheet inserted as part of the Trusts' submission of the Pools, the Trusts' documents demonstrating this chain of ownership do not specifically reference Mata's Loans. The Trusts claim the Loans are subject to three Trust Agreements adopting the TERI Guaranty Agreements, though loans are not listed by name, solely by pools. AER 004.161-004.299.

TERI filed its petition for reorganization under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Massachusetts in 2008, and the Fourth Amended Plan was confirmed on October 29, 2010.[17] In TERI's bankruptcy, the court authorized TERI to reject and terminate its guaranty agreements with Charter One. *See* AER 008.096 (Order, *In re TERI, Inc.*, No. 08-12540 (Bankr. D. Mass. filed June 11, 2008), ECF No. 306). All guaranty agreements executed in favor of the Trusts were likewise deemed rejected. *See* AER 008.194 (Fourth Amended Plan, *In re TERI, Inc.*, No. 08-12540 (Bankr. D. Mass. filed Feb. 25, 2010), ECF No. 1011 at 41.

Mata defaulted on the Loans on April 1, 2013 and no guaranty came into effect. Mata filed his voluntary petition for Chapter 7 relief under the Bankruptcy

[17] Petition, *In re The Education Resources Institute ("TERI"), Inc.*, No. 08-12540 (Bankr. D. Mass. filed Apr. 7, 2008), ECF No. 1; Confirmation of Plan, *TERI, Inc.*, No. 08-12540 (Bankr. D. Mass. filed Oct. 29, 2010), ECF No. 1170.

Code on December 31, 2013 and properly scheduled the Loans. *In re Mata*, No. 6:13-bk-30625-MH (Bankr. C.D. Cal. filed Dec. 31, 2013), ECF No. 1 (AER 005.005-005.074). On April 14, 2014, the Bankruptcy Court ordered discharge of Mata's pre-petition debt and the Trusts were notified of discharge. They did not file an adversary proceeding to contest the debts' dischargeability. Instead, the Trusts demanded payment and, in October 2015, filed suits in the Superior Court of California seeking to reduce the discharged debts to judgment. *National Collegiate Student Loan Trust 2006-1 v. Mata, et al.*, No. CIVDS 1515399 (Cal. Super. Ct. San Bernardino Cty. filed Oct. 19, 2015); *National Collegiate Student Loan Trust 2006-4 v. Mata, et al.*, No. CIVDS 1515313 (Cal. Super. Ct. San Bernardino Cty. filed Oct. 19, 2015); *National Collegiate Student Loan Trust 2007-4 v. Mata, et al.*, No. CIVDS 1515400 (Cal. Super. Ct. San Bernardino Cty. filed Oct. 19, 2015).

III. Procedural History

Mata filed his adversary complaint for determination of discharge in the Bankruptcy Court on April 18, 2018. AER 001.005. The Trusts answered on May 18, 2018, AER 002.001-002.005, and the Parties engaged in discovery in late 2018. AER 003.001-003.004. The Trusts moved for summary judgment on January 9, 2019, Mata filed his opposition on February 5, 2019, and the Trusts filed a reply on February 12, 2019. AER 004.001-012.021. The Bankruptcy Court heard oral

argument on the motion on March 27, 2019 and requested supplemental briefing. AER 013.001-013.024. Supplemental briefs were filed on April 10 and 24, 2019 by Mata and the Trusts. *See* AER 014.001-018.018. On May 8, 2019, the Bankruptcy Court held a second hearing and the Trusts filed proposed findings of fact and conclusions of law thereafter.[18] The Parties each filed supplemental authorities while awaiting a decision. *See* AER 019.001-023.006, 026.001-026.004. On July 31, 2020, the Bankruptcy Court filed its Decision and Judgment in favor of the Trusts. AER 027.001-028.019.

SUMMARY OF ARGUMENT

Section 523(a)(8)(A)(i) does not except from discharge loans guaranteed by corporate nonprofits as held by the Bankruptcy Court. Exceptions to discharge must be narrowly construed in favor of the debtor and such a broad reading of the statute conflicts with this principle and the plain text, canons of statutory interpretation, and legislative history. Section 523(a)(8)(A)(i) contains two distinct exceptions from discharge and the exception for loans made under a program

[18] The Trusts had initially filed evidence under seal, including the Guaranty Agreements, and other pleadings were public only in redacted form. On November 15, 2019, the National Consumer Bankruptcy Rights Center moved to intervene and to unseal the record, and Mata filed a brief in support of the motion. The Trusts opposed unsealing the documents, insisting that they contained valuable commercial information and business secrets about loan rates (for TERI), but the Bankruptcy Court granted the motion.

"funded" by a nonprofit institution does not apply to loans guaranteed by a corporate nonprofit.

Even if such a broad interpretation of Section 523(a)(8)(A)(i) were proper, the Bankruptcy Court did not apply the proper legal standard for summary judgment. The Bankruptcy Court failed to recognize that the TERI Guaranty Agreements were voided prior to Mata defaulting on the Loans and filing bankruptcy such that they are no longer in effect for purposes of Section 523(a)(8)(A)(i). Despite relying on evidence postdating the origination of Mata's Loans that TERI refunded guaranty fees in its bankruptcy to establish that TERI "funded" the Loans' "program," the Bankruptcy Court improperly referenced the Loans' origination date to conclude the Loans were guaranteed by TERI as of 2007. Additionally, the evidence in insufficient to establish that the Loans were ever guaranteed or to establish that TERI was a *bona fide* nonprofit.

ARGUMENT

I. Exceptions to discharge must be narrowly construed in favor of the debtor.

Exceptions to discharge, including those under Section 523(a)(8), are to be construed narrowly—liberally in favor of the debtor and strictly against the creditor. *Christoff*, 527 B.R. at 629 (citing cases); *Crocker*, 941 F.3d at 217 ("All exceptions to discharge [including those under Section 523(a)(8)] are to be interpreted narrowly in favor of the debtor to preserve the 'fresh start' the

Bankruptcy Code provides for debtors.").[19] Despite this fundamental principle, designed to provide debtors with a fresh start, the Bankruptcy Court applied the broadest possible interpretation to Section 523(a)(8)(A)(i), liberally in favor of the creditor-Trusts, and strictly against the debtor-Plaintiff. Such a determination conflicts with the rules of interpretation and is inconsistent with the established burden of the creditor to demonstrate that a loan is not discharged in bankruptcy. *In re McDaniel*, 973 F.3d 1083, 1092 (10th Cir. 2020) (citing cases); *In re Roth*, 490 B.R. 908, 916 (B.A.P. 9th Cir. 2013) ("Under § 523(a)(8), the lender has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters.").[20]

Section 523(a)(8)(A)(i) excepts from discharge a debt for "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution[.]" Section 523(a)(8)(A)(i) does not include loans guaranteed by a nonprofit institution, nor does it include loans made under a program

[19] The Fifth Circuit in *Crocker* noted that there is no presumption of non-dischargeability for education loans. *Id.* at 218 n.8 ("We quote what might seem to be authority that the opposite presumption applies to education loans. Though referring to a party's argument, the Supreme Court could be seen as agreeing that Congress made 'student loan debt presumptively nondischargeable.' ... In context, though, the Court is referring only to education loans from states.") (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004)).

[20] *See also Hazelton v. UW-Stout*, No. 18-CV-159-JDP, 2019 WL 413567, at *3 (W.D. Wis. Feb. 1, 2019), *appeal dismissed,* 952 F.3d 914 (7th Cir. 2020).

guaranteed by a nonprofit institution, but the Bankruptcy Court broadly interpreted it to include both of these examples. This determination—inconsistent with the principles for interpreting discharge exceptions—was based on flawed reasoning.

A. Section 523(a)(8)(A)(i) contains two separate exceptions to discharge.

Two distinct categories of debt are clearly excepted from discharge under Section 523(a)(8)(A)(i):

> (1) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or
>
> (2) [an educational benefit overpayment or loan] made under any program funded in whole or in part by a governmental unit or nonprofit institution.[21]

The first exception does not reference nonprofit institutions at all, demonstrating that Congress did not intend to except from discharge loans guaranteed by nonprofit institutions. To read Section 523(a)(8)(A)(i) in any other manner is contrary to legislative history and canons of statutory construction.

1. Legislative history demonstrates that Section 523(a)(8)(A)(i) was intended to cover two distinct types of educational loans.

Legislative history demonstrates that Congress always intended for the two exceptions to discharge in Section 523(a)(8)(A)(i) to be separate and distinct, and that the first part of the subsection does not apply to except from discharge loans

[21] *See* 20 U.S.C. § 1019(3) ("The term 'education loan' (except when used as part of the term 'private education loan') means—(A) any loan made, insured, or guaranteed under part B of subchapter IV; (B) any loan made under part D of subchapter IV[.]").

guaranteed by nonprofit institutions. Relevant here, the language in the 1984 version of Section 523(a)(8) is essentially the current version of Section 523(a)(8)(A)(i),[22] and as discussed, *supra*, the 1984 version of the statute was only a slight modification to the 1979 version of Section 523(a)(8) (now Section 523(a)(8)(A)(i)).

The Congressional record from 1979 makes clear that the 1978 version of Section 523(a)(8) was enacted specifically to protect from discharge loans made under the GSL Program and the NDSL Program, and that the 1979 amendments were to perfect that protection of those Title IV Programs:

> 11 U.S.C. 523(a)(8) applied only to debts for educational loans owing to a governmental unit or to a nonprofit institution of higher education, it has a very uneven effect upon the student loan programs …. For example, national direct student loan (NDSL) funds are administered by both nonprofit and profitmaking institutions of higher education. Under the new law, a student who obtained an NDSL loan from a profit-making institution of higher education would be free to have that loan discharged in bankruptcy. In contrast, a student who obtained an NDSL loan from a nonprofit institution of higher education would be subject to the prohibitions contained in the new law. … The application … to loans made under the guaranteed student loan (GSL) … program[] would produce even more anomalous results. If the borrower of a GSL … loan filed a bankruptcy petition and the lender then holding the loan was a bank, savings and loan association, credit union, insurance company, pension fund, the

[22] It states, "a discharge … does not discharge an individual debtor from any debt— … for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution." 11 U.S.C. § 523(a)(8) (1984).

> student loan marketing association or … a profit-making institution of higher education, the loan would be fully dischargeable.

See S. Rep. 96-230, at 1-2 (1979); *see also In re Johnson*, 218 B.R. 449, 454 (B.A.P. 8th Cir. 1998) (analyzing legislative history of nondischargeable student loan debt).

Hence, the language employed in the 1979 version (and subsequently, the 1984 version) of Section 523(a)(8) perfectly encompasses the Title IV Programs—the first clause protected the GSL and the second clause protected the NDSL. Additionally, the language Congress used for each clause mirrors the language it used in referring to the respective programs within Title IV. For instance, the phrase in the first clause, "loan made, insured or guaranteed," was used to describe the GSL Program in other statutes. *See, e.g.*, 14 U.S.C. § 2772(a)(1)(A); 20 U.S.C. § 1071 *et seq.*. Likewise, the NDSL Program is described throughout Title IV with language similar to that used in the second clause of Section 523(a)(8). *See, e.g.*, 20 U.S.C. §§ 1087cc, 1087dd, 1087gg.

The legislative history of Section 523(a)(8)(A)(i) therefore demonstrates that it applies to two distinct types of debt, representative of the Title IV Programs of the HEA, excepting from discharge "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit" (GSL), or "[an educational benefit overpayment or loan] made under any program funded in whole or in part by a governmental unit or nonprofit institution" (NDSL). The legislative history in

no way indicates that the first clause—designed to protect GSLs—might provide an exception to discharge for nonprofit institutions.[23]

2. Section 523(a)(8)(A)(i) contains two distinct exceptions from discharge pursuant to canons of statutory interpretation.

Interpreting Section 523(a)(8)(A)(i) as two distinct exceptions (with different meanings) is consistent with the nearest-reasonable-referent canon of statutory interpretation. Under that canon, when the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent. *See United States v. Nishiie*, 421 F. Supp. 3d 958, 967 (D. Haw. 2019). Here, the postpositive modifier—"by a governmental unit or nonprofit institution"—applies only to the nearest reasonable referent—"an educational benefit overpayment or loan … made under any program funded in whole or in part." Under this canon, the postpositive modifier "by a governmental unit or nonprofit institution" is not applicable to the first part of the subsection—"an educational benefit overpayment or loan made, insured, or guaranteed"—because it is not the nearest reasonable referent.[24] The

[23] In 2010, Congress ended the GSL, and all federal loans are now made through the Direct Program. The Direct Program, like the NDSL, is directly funded by the government, and because of the precision employed by Congress in drafting this statute, these loans remain protected under Section 523(a)(8)(A)(i).

[24] Additionally, there is a separate postpositive modifier—"by a governmental unit"—immediately following it, such that "an educational benefit overpayment or

nearest-reasonable-referent canon therefore establishes that there are two distinct categories of debt excepted from discharge under Section 523(a)(8)(A)(i), and nonprofit institutions are only relevant in the context of the second category of debt. Had Congress intended to include in the exception loans guaranteed by a nonprofit institution, it could have drafted Section 523(a)(8)(A)(i) to include the underlined text so as to except from discharge loans "made, insured, or guaranteed by a governmental unit or nonprofit institution, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." It did not.

To interpret the postpositive modifier "by a governmental unit or nonprofit institution" to apply to "an educational benefit overpayment or loan made, insured, or guaranteed" would also violate the canon against superfluity. The canon against superfluity requires courts to give each word and clause of a statute operative effect, if possible. *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 106, (2011). Courts should not interpret any statutory provision in a way that would render it or another part of the statute inoperative or redundant.

Interpreting "by a governmental unit or nonprofit institution" to apply to the entire subsection would, however, render the first use of "by a governmental unit"

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loan made, insured, or guaranteed" is the nearest reasonable referent for "by a governmental unit."

duplicative and unnecessary.[25] Had Congress intended to include in the exception loans guaranteed by nonprofit institutions, it could have avoided such duplicity by drafting Section 523(a)(8)(A)(i) to exclude the stricken text to except from discharge loans "made, insured, ~~or~~ guaranteed ~~by a governmental unit~~, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." It did not.

Additionally, Section 523(a)(8)(A)(i) uses the word "or" to separate debts that are described with different vocabulary. In the text, "or" separates loans "made, insured, or guaranteed by a governmental unit" from loans "made under any program funded in whole or in part by a governmental unit or nonprofit institution." Just as "nonprofit institution" cannot be read into the first exception, "insured" and "guaranteed" cannot be read into the second exception.[26]

[25] In fact, this Court's interpretation of Section 523(a)(8)(A)(i) in *Pilcher* renders the entire first clause unnecessary. After all, any loan made, guaranteed, or insured by a governmental unit could likewise be classified as a loan made under a program in which a governmental unit "played a meaningful part." *See* 149 B.R. at 598.

[26] Relying on 11 U.S.C. § 102 ("Section 102"), the Bankruptcy Court concluded that Congress's use of "or" was not "meant by Congress to exclusively limit the right of exception from discharge through guarantees to student loans issued by governmental units[.]" AER 028.011. This is an incorrect application of Section 102(5). The 1978 legislative notes provide: "Paragraph (5) specifies that 'or' is not exclusive. Thus, if a party 'may do (a) or (b)', then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives."

If the Bankruptcy Court was correct that the two clauses within Section 523(a)(8)(A)(i) are not mutually exclusive under any circumstances, that would mean that a debt could be guaranteed by the same governmental unit that funded the debt. *150 Broadway N.Y. Assocs., L.P. v. Bodner,* 14 A.D.3d 1, 8 (N.Y. App. Div. 2004) ("[A]n interpretation of an instrument that would result in making a person or entity the guarantor of his, her or its own debt must be rejected."); *Medina v. Nat'l Collegiate Student Loan Tr. 2*, No. 17-05276-LT7, 2020 WL 5545697, at *1 (Bankr. S.D. Cal. June 2, 2020) ("Is Defendant contending that TERI guaranteed repayment of its own loan? If so they have provided no authority for the proposition that a lender can serve as its own guarantor.").[27]

Applying Section 102(5) in the context of Section 523(a)(8)(A)(i), the use of "or" suggests that a loan may be excepted from discharge, for example, because it is either (1) "guaranteed by a governmental unit," or (2) "made under [a] program funded … in part by … a nonprofit institution," or (3) *both* made under a program funded in part by a nonprofit institution *and* guaranteed by a governmental unit. The exceptions, under some circumstances, are not mutually exclusive. However, Section 102(5) does not support the Bankruptcy Court's conclusion that Congress's use of "or" renders inconsequential the carefully selected, distinct, and specific vocabulary used in the various subsections of Section 523(a)(8).

[27] In a markedly similar situation, the Second Circuit concluded that the use of another conjunction—"and"—in the HEA could not be interpreted to mean "both" without leading to the absurdity that an educational debt could be both *made* under a program in Part C and insured under Part B, which the Second Circuit concluded was not a tenable interpretation. *United States v. Gibson*, 770 F.2d 306, 308 (2d Cir. 1985) (stating the government's proffered construction would mean that "funds provided or insured under both the federal student loan programs and the federal work-study program. We are unaware of the existence of any such funds,

B. Section 523(a)(8)(A)(i)'s exception for loans made under a program "funded" by a nonprofit institution does not apply.

The second clause of Section 523(a)(8)(A)(i) is similarly inapplicable to loans guaranteed—or made under a program guaranteed—by a nonprofit institution; it applies only to loans "made under any program funded in whole or in part by a governmental unit or nonprofit institution." "Funded" should not be interpreted broadly to include "guaranteed." Additionally, "nonprofit institution" was not intended to include all 501(c) organizations.

The tools for interpreting statutory text do not weigh in favor of reading Section 523(a)(8)(A)(i)'s second clause to mean "guaranteed" loans. There are four categories of tools for interpreting statutes: (1) the text of the statute, (2) legal interpretations of the statute, (3) the context and structure of the statute, and (4) the purpose of the statute. The Bankruptcy Court, in concluding that the word "funded" as used in the second part of Section 523(a)(8)(A)(i) could also mean "guaranteed," relied solely on case law wherein "funded" was interpreted to mean "played any meaningful part."[28] Though prior legal interpretations may indicate that the Bankruptcy Court's broad interpretation of Section 523(a)(8)(A)(i) was

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nor has Gibson or the government directed our attention to the existence of such funds.").

[28] Plaintiff respectfully maintains that these cases were wrongly decided.

proper, the other tools for statutory interpretation demonstrate otherwise, favoring a conclusion that the word "funded" does not mean "guaranteed."

First, the text of the statute does not support a reading of "funded" to mean "played any meaningful part" or "guaranteed." An ordinary or reasonable understanding of "funded" would not connote such a broad understanding, nor would the dictionary definition denote one. "Funded" is the past tense and past participle of the verb "fund," which means "to furnish (as an institution) with a regular source of income" or "to provide money for." *Fund*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/fund (last visited Oct. 9, 2020).[29] There is no ambiguity that, in order to "fund" a person or thing, actual capital must be bestowed upon that person or thing. One cannot "fund" a program simply by providing good will or emotional support—the definition is clear that income must be furnished, or money provided.

"Funded" cannot mean "guaranteed" because "funded" requires that money or income has already exchanged hands, whereas "guaranteed" does not. "Guaranteed" is the past tense and past participle of the verb "guarantee," which means, in relevant part, "to undertake to answer for the debt, default, or

[29] *See also In re Stewart*, 592 B.R. 414, 438 (B.A.P. 1st Cir. 2018), *vacated and remanded on other grounds,* 948 F.3d 509 (1st Cir. 2020) ("[T]he bankruptcy court appears to have ignored the plain meaning of the word, 'fund,' which, in its verb form, means 'to allocate or provide funds for ... a project ….'") (citation omitted).

miscarriage of"; "to engage for the existence, permanence, or nature of, undertake to do or secure"; or "to give security to." *Guarantee*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/guarantee (last visited Oct. 9, 2020). The two are not interchangeable. "Guaranteed" indicates a promise for future payment, but the word does not necessitate that money ever exchange hands (either because fulfillment of the guarantee is never sought or because it is made impossible), whereas "funded" commands that the exchange of money has already occurred.

Courts have recognized this distinction in other contexts. For example, in *Grojean v. Commissioner*, 248 F.3d 572 (7th Cir. 2001), the plaintiff borrowed $10 million for one of his portfolio companies and, in lieu of an express personal guaranty of the debt, it was instead structured as two separate loans—one for $8.4 million to the company and one for $1.2 million to the plaintiff (to be used to purchase a participation interest in the loan to the company). *Id.* at 572-73. After the company sustained losses, the plaintiff claimed a tax deduction of $1.2 million, representing the portion he had liability on. The IRS rejected the plaintiff's claim, concluding that the $1.2 million was not a loan to the company, but only a guaranty. *Id.* at 573. The Seventh Circuit affirmed, noting that the difference between a loan and a guaranty "is not trivial or nominal ('formal')." Id. The court acknowledged that, "[a]t a high enough level of abstraction, … the difference

between providing [or lending] and enabling [or guaranteeing] the provision of funding may disappear. … But at the operational level, … there really is a substantive and not merely a formal difference between lending and guaranteeing." *Id.* at 574.

Second, the context and structure of Section 523(a)(8)(A)(i) demonstrate that "funded" does not mean "guaranteed." Canons of construction favor a narrower reading of "funded." Namely, the presumption of meaningful variation instructs that when the legislature departs from the consistent usage of a particular term, the legislature intends for that particular term to have a different meaning. *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Congress used "made, insured, or guaranteed by" in the first part of Section 523(a)(8)(A)(i), but used "made under any program funded … by" in the latter part of the subsection. Congress could have included "guaranteed" in the second part of the subsection but did not. Indeed, the 1978 version of Section 523(a)(8)(A)(i) treated debts for educational

loans to governmental units and nonprofit institutions of higher education the same,[30] and Congress specifically sought to fix that in the 1979 version.

As demonstrated elsewhere in the Bankruptcy Code, Congress knew how to distinguish those that fund loan programs from those that play a secondary role in a loan program. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 313, 108 Stat. 4106 (11 U.S.C. § 525(c)(1) (1994)) (distinguishing a "governmental unit that operates a student grant or loan program" from "a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program"). Case law has also acknowledged this distinction. *See, e.g.*, *United States v. Diwre*, 872 F.2d 431 (9th Cir. 1989) ("Diwre obtained at least five federally-guaranteed student loans and three federally-funded student grants[.]"); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 F.C.C. Rcd. 9074, 9082 n.54 (2016) (stating that Congress did not intend the phrase "owed to or guaranteed by" as used in the Budget Act to include debts "insured, … coinsured, or reinsured, in whole or in part").[31]

[30] *See* Act of Nov. 6, 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549 (1979) ("[A] discharge … does not discharge an individual debtor from any debt … to a governmental unit, or a nonprofit institution of higher education, for an educational loan.").

[31] Importantly, the government does not allow the OMB, agencies, or contractors to transform a loan guarantee into a direct outlay of capital even when the guarantee is performed upon for budgeting purposes. 2 U.S.C. § 661a ("The term 'direct loan' means a disbursement of funds by the Government to a non-Federal

The last tool for statutory interpretation—the purpose of the statute—also weighs against the broad interpretation of "funded." The legislative history of Section 523(a)(8)(A)(i) reveals that the two clauses within the subsection were intended to cover the two types of federally subsidized education loans in existence at the time the statute was drafted. The first clause, for loans "made, insured, or guaranteed by a governmental unit," was drafted to cover loans made under the GSL Program (which ultimately became the FFEL Program), which consisted of loans made by private lenders but guaranteed against default by the federal government.

The second clause, for loans "made under any program funded in whole or in part by a governmental unit or nonprofit institution (of higher education)," was drafted to cover NDSLs, which ultimately became Perkins Loans. NDSLs were (and Perkins Loans still are) provided by participating postsecondary institutions directly to students. Under the Perkins Loan Program, just as with the NDSL Program, the government provides a set amount of funds to each participating school for the school to award to students based on need. 20 U.S.C. § 1087aa *et seq.*; 20 U.S.C. § 1087aa *et seq.* (1976). The school may contribute its own money to those funds, though not required, such that the Perkins Loan Program at each

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borrower ... [t]he term does not include the acquisition of a federally guaranteed loan in satisfaction of default claims.").

participating school can be funded either in whole by the government, or in part by the government and in part by the school (including nonprofit institutions of higher education).[32] The Perkins Loan Program, like the NDSL Program, does not provide for guarantees by governmental units or nonprofit institutions. Accordingly, the purpose of Section 523(a)(8)(A)(i), as demonstrated by its legislative history, confirms that "funded" does not mean "guaranteed."

The legislative history additionally demonstrates that "nonprofit institution" was not intended to apply to all 501(c) organizations. The 1978 and 1979 versions of the statute both referenced a "nonprofit institution of higher education." However, in 1984, "of higher education" was omitted in response to courts having difficulty determining what constituted an "institution *of higher education*." Congress explained that the amendment was merely to resolve this debate.[33]

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[32] *Lee v. Bd. of Higher Ed. in City of New York*, 1 B.R. 781, 782 n.1 (S.D.N.Y. 1979) ("The NDSL program provides needy students with financial assistance. Under NDSL, the federal government furnishes 90% of the loan, the university provides the remaining 10%, and the university is charged with collection.") (citing 20 U.S.C. § 1087aa *et seq*. (1976)).

[33] *See also Bankruptcy Improvements Act: Hearing on S. 333 and S. 445 Before the S. Comm. On the Judiciary*, 98th Cong. 1, 328-29 (1983) (statement of Professor Frank R. Kennedy, Univ. of Mich. Sch. of Law, Ann Arbor, Mich.), 1983 WL 506604, at 172-73 (AER 008.038-AER 008.039) ("[D]eleting 'of higher education' enlarges the scope of the nondischargeability exception and is therefore substantive to that extent. It is a modest enlargement, however, in that the claimant must be a nonprofit institution and the loan must be one for an educational loan. The change eliminates litigation over the question whether a seminary, for example, is an

Contrary to what later case law would conclude,[34] this amendment was only a "modest enlargement" to the statute's substantive scope. Congress deleted the phrase "of higher education," but this did not change the meaning of the term "nonprofit institution." *See McClure v. United States*, 95 F.2d 744, 750 (9th Cir. 1938) ("Where an amendment leaves certain portions of the original act unchanged, such portions are continued in force with the same meaning and effect they had before amendment.").[35] The term "institution" means a "scholastic institution" rather than any organization or corporation; the HEA statutes and regulations consistently use the term "institution" as a shorthand for college, university of vocational school.[36] Consequently, "nonprofit institution" should not be read to include all 501(c) organizations.

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institution of higher education. The amendment is thus to some extent at least clarifying.").

[34] *See, e.g.*, *In re Goldstein*, No. 11-81255, 2012 WL 7009707, at *3 (Bankr. N.D. Ga. Nov. 26, 2012).

[35] *See also Muniz v. Hoffman*, 422 U.S. 454, 468 (1975) (stating that ("We cannot accept the proposition that Congress, without expressly so providing, intended … to change the [scope of the statute.] … Just as [the section] may not be read apart from other relevant provisions of the labor law, that section likewise may not be read isolated from its legislative history and the revision process from which it emerged[.]").

[36] *See, e.g.*, 34 C.F.R. §§ 668.1(a) & (b), 668.14.

II. The Bankruptcy Court failed to view the evidence in the light most favorable to Plaintiff, as nonmovant.

It is the Trusts' burden to prove Mata's Loans are non-dischargeable. *In re Bronsdon*, 435 B.R. 791, 796 (B.A.P. 1st Cir. 2010) ("The creditor bears the initial burden of establishing that the debt is of the type excepted from discharge under § 523(a)(8).").[37] "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal quotation mark and citation omitted). "[T]he moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *Id.* (citation omitted). "If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence." *Lucas v. Bell Trans*, 773 F. Supp. 2d 930, 934 (D. Nev. 2011) (citation omitted).[38]

[37] *In re Dickerson*, 510 B.R. 289, 305 n.8 (Bankr. D. Idaho 2014) ("If Collection is in doubt as to the status of any debts … it … may commence an adversary proceeding in this Court to obtain a formal determination of dischargeability as to those debts.").

[38] "If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. … the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that the claimed factual dispute be shown to require a jury or judge

A. There is a genuine issue of material fact as to whether TERI actually guaranteed Mata's Loans.

Even if Section 523(a)(8)(A)(i) is interpreted to exclude from discharge loans guaranteed by nonprofit institutions such as TERI (it should not be), the evidence demonstrates that Mata's Loans were not guaranteed by TERI at the time he filed for bankruptcy. Further, a review of the evidence demonstrates a genuine issue of material fact as to whether Mata's Loans were ever guaranteed by TERI. *Giannullo v. City of New York*, 322 F.3d 139, 143 n.5 (2d Cir. 2003) (failure to verify that the evidence actually supports the material facts as stated in a motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

The Trusts have shown that there is an incomplete chain of ownership as to Mata's Loans such that the Guaranty Agreements in favor of the Trusts are potentially inapplicable to Mata's Loans. Similarly, the Guaranty Agreements reveal that TERI's guarantees of loans were conditional and, consequently, because the conditions were not fulfilled, do not apply to Mata's Loans.

1. Mata's Loans were not guaranteed at the time he filed bankruptcy and the petition date controls.

Assuming *arguendo* that Mata's Loans were guaranteed by TERI, the Loans certainly were not guaranteed by TERI when Mata sought relief under the

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to resolve the parties' differing versions of the truth[.]" *Id.* (internal quotation marks and citations omitted).

Bankruptcy Code on December 31, 2013. AER 005.005.-005074. And to the extent Mata's Loans were ever made under any "program" guaranteed by TERI, the program was no longer guaranteed (or funded) by TERI by 2013.

The Trusts argue that Mata's Loans, originated in 2006 and 2007 by Charter One, are subject to the TERI Guaranty Agreements executed in 2002 and 2004, and as made applicable by the Trust Agreements. AER 006.004; AER 006.109. TERI filed its bankruptcy petition in 2008, and on June 11, 2008, the court "authoriz[ed TERI] to reject and terminate its existing loan origination agreements and guaranty agreements with RBS." AER 008.096.[39] All guaranty agreements executed in favor of the Trusts were likewise deemed rejected. AER 008.194. Guaranty fees were refunded to the loan originators and trusts, and an additional payment was made to settle all claims on individual loans.[40]

Accordingly, when Mata filed his bankruptcy petition in 2013, any guaranty agreement that may have been applicable to his Loans was no longer in effect. Though the Bankruptcy Court below held that the origination date of Mata's Loans—rather than Mata's petition date—is relevant for purposes of determining whether the Loans were guaranteed so as to be non-dischargeable debts, the court

[39] *See also* AER 008.190-008.191.

[40] The borrowers did not receive any setoff or credit for the amounts paid by TERI to the banks and trusts to settle all claims regarding the borrowers' individual loans.

did not cite any case law in support of this view. And strangely, the law that *was* applied by the court directly conflicts with other portions of its decision.

The petition date—not the loan origination date—governs a dischargeability determination under Section 523(a)(8).[41] Section 523(a)(8) concerns dischargeable *debts*. *See* 11 U.S.C. § 523(a)(8) ("A discharge … does not discharge an individual debtor from any debt … unless excepting such debt from discharge … would impose an undue hardship …."). "The term 'debt' means liability on a claim." *Id.* § 101(12). "Claim" is defined by the Bankruptcy Code as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" *Id.* § 101(5)(A). "Claims" are held by "creditors." *Id.* § 101(10). A creditor's claim is fixed at the petition date. *In re Abdelgadir*, 455 B.R. 896, 903 (B.A.P. 9th Cir. 2011).[42] Notably, the value of the Trusts' claims (alternatively

[41] *See, e.g.*, *In re Tremblay*, No. 11-09732-MMB, 2012 WL 2915367, at *2 (Bankr. S.D. Cal. July 16, 2012) ("The petition date is the watershed date of a bankruptcy proceeding; thus, creditors' rights are fixed (as much as possible) as of this date.") (internal quotation marks and citations omitted).

[42] *Guillermety v. Sec'y of Educ. of U.S.*, 241 F. Supp. 2d 727, 735 (E.D. Mich. 2002) ("[T]he Court [in *Marxen*] held that the debt was not a claim of the United States for priority purposes until the United States paid its insurance obligation[.]"); *see also United States v. Marxen*, 307 U.S. 200, 207 (1939) ("[T]he rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy.").

stated as Mata's debts) was determined by the petition date—not by the origination date of the Loans.

The Bankruptcy Court, relying on the principle that it is bound by "the plain language of the Bankruptcy Code [when it] is clear," concluded that "the text of 11 U.S.C. § 523(a)(8)(A)(i) states that a loan is nondischargeable when it is '*made* under any program funded in whole or in part by a governmental unit or nonprofit institution'" and "this clearly points to the status of a loan being determined by the nature of its creation, not its nature at the time of petition." AER 028.018-028.019 (citations omitted) (emphasis added by court). This reasoning is flawed.

First, it is *debts*—and not loans—that are dischargeable (or not) under Section 523(a)(8).[43] Second, this Court previously rejected this precise reasoning. In *Abdelgadir*, the Bankruptcy Court had interpreted the text of 11 U.S.C. § 1123(5), which states "a claim secured only by a security interest in real property that is the debtor's principal residence," to indicate that the confirmation date—as opposed to petition date—governed determinations as to the creditor's claim. 455 B.R. at 902. Specifically, the Bankruptcy Court relied on the text's use of the present tense in the phrase, "property that *is* the debtor's principal residence." *Id.* This Court rejected that reasoning, noting:

[43] The statute does not state, as the Bankruptcy Court suggests, "that a loan is nondischargeable when …." The statute states: "A discharge … does not discharge … any debt … for …." 11 U.S.C. § 523(a)(8).

> A narrow focus on sub-phrases, which modify antecedents within the clause, is misplaced. Based on the grammatical structure of the statute, the words "secured only by a security interest in real property that is the debtor's principal residence" modifies "claim" and describes the type of claim that is excepted from modification.
> …
> The plain language of § 1123(b)(5) excepts a particular type of claim from modification. … [A] creditor's right to payment, whether it later is deemed secured or unsecured depending on the value of the collateral, is fixed at the petition date. ... Therefore, our statutory analysis leads us to conclude that the determinative date for whether a claim is secured by a debtor's principal residence is, like all claims, fixed at the petition date.

Id. at 903. The same logic demands rejecting the Bankruptcy Court's reasoning.

Third, the Bankruptcy Court's reasoning would negate its other conclusions—primarily as to whether TERI actually guaranteed the Loans. The court noted that, "[i]n order to fund a loan program through guaranteeing the underlying loans, the guarantee must actually come into effect[.]" AER 028.017. In determining that TERI had made payments under the loan programs, the court relied solely on evidence of payments made to the loan originators and trusts (including the Defendant Trusts) in TERI's bankruptcy—*i.e.*, payments made between 2008 and 2010. AER 028.017-028.018. If Mata's origination date controlled as the court suggested (it does not), then there would still exist a genuine issue of material fact as to whether payments had been made (for the guarantees to come into effect and constitute "funding") as of the origination date of the Loans in 2006 and 2007. The Bankruptcy Court cannot apply the loan origination date for

purposes of determining whether there was a guarantee, but the petition date for purposes of determining if payments had been made.[44]

Accepting the Bankruptcy Court's reasoning would likewise lead to absurd results: lenders could prevent discharge of debts by establishing separate nonprofit corporations and providing borrowers with loans guaranteed by the nonprofit (and charging the borrower the guaranty fee paid to the "nonprofit"), then dissolving the nonprofit shortly thereafter with the fees refunded directly to the lender. The lender would retain the fee paid by the borrower and the debt would be forever nondischargeable. Though this hypothetical may sound ludicrous, this is precisely the story—albeit simpler—of FMC and the TERI guarantees (and the associated banks and trusts). This Court should find Mata's debts to the Trusts dischargeable even if it adopts the Bankruptcy Court's interpretation of Section 523(a)(8)(A)(i).

2. There is a genuine issue of material fact as to whether TERI guaranteed Mata's Loans.

a. The Trusts cannot demonstrate ownership of Mata's Loans or prove they were subject to the Guaranty Agreements.

The Trusts submitted a series of documents to demonstrate their ownership of Mata's Loans and, consequently, that the Loans are subject to the Trust

[44] Additionally, if in fact the plain language "made under any program funded in whole or in part by a governmental unit or nonprofit institution" is clear as stated by the Bankruptcy Court, then its broadening of the definition for "funded" to mean "played any meaningful part" is unjustifiable. The Bankruptcy Court should not be able to apply different standards to the same text.

Agreements providing adopting the TERI Guaranty Agreements. However, the documents submitted by the Trusts are insufficient to establish ownership of the Loans or that TERI guaranteed the Loans. Moreover, the Trust Agreements do not specifically reference Mata's Loans.

For the Trusts to prove ownership of Mata's Loans, every document evidencing an assignment of ownership must reference the specific accounts pertaining to the Loans at issue; it is insufficient to make reference only generally to thousands of accounts being purchased at the same time without referencing Mata's account. *See, e.g.*, *In re Kendall*, 380 B.R. 37, 46 (Bankr. N.D. Okla. 2007) ("The Bill of Sale is insufficient to establish that the [debt] was transferred to [the creditor]. The Bill of Sale does not identify the [debt] as one of the 2,875 accounts transferred[.]"). Though the Pools include Roster sheets referencing Mata's individual Loans (allegedly included in Schedule 1 to the Pools), it was not verified that the individual Roster sheets were actually part of the Pools. AER 004.061, 004.104, 004.146. The Declaration of Bradley Luke, employee for Transworld Systems Inc. ("TSI"), did not and cannot indicate how the Roster sheet was created or maintained so as to authenticate it, as the Loans were originated and

transferred before the declarant began his employment at TSI. AER 004.026-004.033.[45]

Even if the Roster sheets were sufficient evidence to demonstrate the transfer of ownership between Charter One and National Collegiate, there is no evidence that the specific accounts pertaining to Mata's Loans were transferred from National Collegiate to the Trusts, as they are not identified by name in the DASAs. AER 004.062-004.075, 004.105-004.115, 004.147-004.156. Moreover, with regard to the Astrive Loan, it should be noted that the December 7, 2006 Pool, purportedly transferring all referenced loans from Charter One to National Collegiate, does not even reference loans made under the Astrive Loan Program as subject to the transfer. AER 004.102-004.103.

Notably, courts all over the country have declined to recognize the Trusts' ownership (and other National Collegiate trusts' ownership) of student loan debt like Mata's based on finding similar evidence insufficient. *See, e.g.*, *Nat'l Collegiate Student Loan Tr. 2007-4 v. Watson*, 61 N.Y.S.3d 191 (N.Y. Civ. Ct. 2016) (holding that the 2007-4 Trust failed to establish the chain of title from Charter One to the 2007-4 Trust and that the September 20, 2007 DASA

[45] *In re Vee Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005) (discussing elements for introducing business records under hearsay exception and authenticity concerns).

insufficient to establish that National Collegiate assigned the borrower's loan).[46] Hence, there is a genuine dispute of material fact as to whether Mata's Loans were properly transferred to the Trusts to be bound by the Trust Agreements providing for the guaranty by TERI.

The Bankruptcy Court's reliance on the "loan activity pages" as evidence that TERI guaranteed Mata's Loans was also in error. AER 028.016; *see also* AER 004.043-004.055, 004.088-004.099, 004.129-004.139. The declaration regarding the loan activity pages was insufficient,[47] such that any "assertions regarding [their] reliability and accuracy … were fundamentally conclusory and in the nature of opinion." *In re Vee Vinhnee*, 336 B.R. 437, 448 (B.A.P. 9th Cir. 2005); *see also Webb v. Midland Credit Mgmt., Inc.*, No. 11-C-5111, 2012 WL 2022013, at *4 (N.D. Ill. May 31, 2012) (explaining that an an employee of a custodian of records typically will not be able to certify records created by the original creditor). The Bankruptcy Court did not even consider the Imwinkelried eleven-step foundation

[46] *See also NTL Collegiate Stndt Loan Tr. 2005-1 v. Owusu*, 12th Dist. Butler No. CA2015-07-137, 2016-Ohio-259, 2016 WL 363550, at ¶ 10 ("NCSLT did not include specific documentation to directly link the pool of debts assigned to NCSLT from Charter One [in the pool agreement] to the debt [at issue]."); *Nat'l Collegiate Student Loan Tr. 2003-1 v. Thomas*, No. 48,627 (La. App. 2 Cir. 11/20/13); 129 So. 3d 1231, 1234 ("The Pooling Agreement offers no description of the loans being assigned by Bank One."); *Nat'l Collegiate Loan Trust 2007-3 c/o FMD Legal v. Lafavers, et al.*, No. 12-CI-629 (Pulaski Cir. Ct. of Ky. Oct. 1, 2013), *available at* https://www.nclc.org/images/pdf/unreported/Lafavers_Order.pdf.

[47] AER 004.026-004.033.

for computer records, a review of which would reveal that the loan activity pages should not have been admitted into evidence. *Vee Vinhnee*, 336 B.R. at 446 (citing Edward J. Imwinkelried, Evidentiary Foundations § 4.03[2] (5th ed. 2002)); *see also In re Vargas*, 396 B.R. 511, 518 (Bankr. C.D. Cal. 2008) (same).[48]

The "trust agreements on the SEC's EDGAR site" were also improperly relied on by the Bankruptcy Court in concluding there was no genuine issue of material fact that TERI guaranteed Mata's Loans. *See* AER 028.016. While a court may take limited judicial notice of documents from the SEC website, it should not take judicial notice for the purposes of establishing a disputed fact—namely, that Mata's Loans were included in the pools of loans when Mata's individual Loans are not clearly identified in the SEC documents. *See In re Waters*, No. A10-00388-DMD, 2011 WL 5508657, at *8 (Bankr. D. Alaska Mar. 15, 2011) (taking limited judicial notice of documents from SEC website, including Pooling and Servicing Agreement, but refusing to take judicial notice of disputed fact that the mortgage loan was included in this pool of loans because debtor's loan was not clearly identified in SEC documents); *see also id.* ("As the Ninth Circuit has observed, a

[48] Additionally, the Bankruptcy Court assumed (without explanation) that the reference to "PEPLN" in the loan activity pages simply refers to "private student loans as opposed to federal student loans[.]" AER 028.016. Though the error is immaterial, it highlights the Bankruptcy Court's willingness to make assumptions favoring the Trusts without looking at the evidence, which demonstrates that "PEPLN" likely refers to Professional Education Plan Loans. *See* AER 006.164 (Guaranty Agreement referencing "Professional Education Plan (PEP) loans").

court may only take judicial notice of *undisputed* matters of public record, and cannot take judicial notice of disputed facts stated in public records.") (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)) (emphasis in original). Granting summary judgment was thus improper.

b. The Guaranty Agreements were conditional.

The evidence submitted by the Trusts is not only insufficient to satisfy their summary judgment burden as movant, it demonstrates a genuine issue of material fact as to whether the TERI Guaranty Agreements were applicable to Mata's Loans. Contrary to the bankruptcy court's misleading statement in *In re Greer-Allen*, 602 B.R. 831 (Bankr. D. Mass. 2019),[49] the Guaranty Agreements demonstrate that TERI's guaranty of loans is conditioned upon four items:

> a. The LENDER must have filed its claim for guaranty payment … following the procedures specified in the Program Guidelines.
> b. The LENDER and its predecessors in interest must … have complied with all other requirements of the Program Guidelines applicable to the Loan.
> c. The LENDER shall have paid to TERI the Initial Guaranty Fee … for the Loan in question ….

[49] The court quoted the Guaranty Agreement in part, stating: "Section 2.1 of the guaranty states that 'TERI hereby guarantees to Bank One, unconditionally ... the payment of 100% of the principal of and accrued interest on every Loan as to which a Guaranty Event has occurred.'" *Id.* at 839. Had the court included the full text of Section 2.1 rather than an ellipsis to imply that the guaranty is unconditional, it reads: "TERI hereby guarantees to the LENDER, unconditionally except as set forth in Section 2.2 below, the payment of 100% …." AER 006.006, 006.111.

> d. TERI must have received from the LENDER the original Promissory Note, … endorsed to TERI in such manner as to transfer to TERI all rights in and title to such Promissory Note ….

AER 006.006-006.007, 006.111-006.112. The Trusts did not demonstrate that these conditions were fulfilled, and the evidence establishes they could not have been.

First, there is no evidence that Charter One paid a guarantee fee to TERI. Second, the evidence demonstrates that the condition in Section 2.2(b) could not have been met as it requires compliance with the "Program Guidelines applicable to the Loan." The Program Guidelines under the NextStudent Guaranty state that, loans "in excess of a Participating School's published cost of attendance" require "a letter … from the School stating these additional funds are needed as education expense. Costs verified in this manner are consider[ed] part of the 'Cost of Education' for purposes of the program maximums set forth in the attached Schedules." AER 006.041. The *published* "cost of attendance" is determined by educational institutions in accordance with 20 U.S.C. § 1087*ll* and reported to the U.S. Department of Education and is in turn published on the Integrated Postsecondary Education Data System ("IPEDS") website. If the Next Student Loans exceeded the cost of attendance on IPEDS, a letter from LLU would therefore be required.

Similarly, the Program Guidelines under the START Guaranty, alleged to be applicable to the Astrive Loan, state direct-to-consumer graduate loans may not exceed "the lesser of (a) $30,000 or (b) the Participating School's Annual Program Education Expense (as defined in the 'Maximum annual loan amount' section in the applicable Loan Program Definitions Schedule attached hereto)." AER 006.139. Though the Trusts did not indicate which Graduate Loan Program the Astrive Loan is subject to, the Loan Program Definitions of both Graduate Programs outlined in the START Guaranty indicate that the Astrive Loan was in excess of the permissible amount. Pursuant to the START Creditworthy Graduate Loan Program, the Loan could not exceed the lesser of $30,000 or the "Annual Program Education Expense, which is the school's most recently published cost of attendance" (where "[c]ost of attendance shall be taken from the most recent school file published by the U.S. Department of Education") "plus the average annual increase in cost of attendance … plus $5,000 for personal computer[.]" AER 006.147. Under the START Creditready Graduate Loan Program, the annual maximum loan amount is $20,000. AER 006.149. Thus, the Astrive Loan either could not exceed: (1) the lesser of $30,000 or the "cost of attendance" as published on IPEDS plus $5,000 and "the average annual increase in cost"; or (2) $20,000.

According to IPEDS, the cost of attendance at LLU (and the corresponding Loan for that year) was $15,672 from 2006 to 2007 ($30,000 Next Student 2006

Loan received), $18,520 from 2006 to 2007 ($30,000 Astrive Loan received), and $19,640 from 2007 to 2008 ($30,000 Next Student 2007 Loan received). AER 008.043-008.068. In light of the requirements of the Guaranty Agreements set forth above, the Loans each exceeded the maximum loan amount, and they were each in excess of the cost of attendance as published on IPEDS. Regarding the Next Student Loans, the Trusts provided no evidence that the lender obtained written authorization from LLU.

The Bankruptcy Court's rough estimations regarding the cost of attendance are woefully insufficient (and unsupported by the evidence), as it incorrectly relied on LLU's admissions brochures to determine the cost of attendance instead of LLU's values reported to the DOE. The figures for living expenses used by the Bankruptcy Court are also not supported by the cited brochures.[50] Nevertheless, the Bankruptcy Court itself demonstrated at least one dispute of material fact even while using the inflated cost of attendance values, as it stated the cost of attendance

[50] The Bankruptcy Court's conclusory statement that living expenses are necessarily included within the scope of an "educational loan" disregards the law and the Guaranty Agreements. *Shaffer v. Block*, 705 F.2d 805, 819 (6th Cir. 1983) ("[These] expenses, including transportation, room and board, miscellaneous personal expenses … is classified as normal living expenses under the food stamp program rather than education expenses."); *In re Stewart*, 215 B.R. 456, 465 (B.A.P. 10th Cir. 1997), *aff'd,* 175 F.3d 796 (10th Cir. 1999) ("[S]tudent loans are not consumer debts per se.").

could have been as low as $87,000 over three years, yet Mata received $90,000. AER 029.008.

Finally, the Guaranty Agreements include accepted forms for promissory notes. In each, the TERI disclosure is the same. AER 006.074-006.102, 006.179-006-245. Though the Next Student 2006 Loan uses the approved promissory note and language related to TERI, AER 004.037, the Next Student 2007 Loan and the Astrive Loan do not. AER 004.082, 004.123. There is a genuine dispute of material fact as to whether TERI ever guaranteed the Loans.

Even if the Loans were guaranteed, and TERI "waived" the requirements under the Guaranty Agreement as to Mata's Loans, the Loans cannot be said to have been "made" under the identified "program," as the Loans do not fall within the contours of the NextStudent or the START Graduate Loan Programs. Absent a loan adhering to the contractual parameters of a particular lending program, it does not fit within that program simply because it is made by a bank with a lending program.

B. There is insufficient evidence that TERI was a *bona fide* nonprofit.

The Trusts have not demonstrated that TERI was a "nonprofit." The Trusts offered no evidence that TERI was a 501(c) organization. *See Medina v. Nat'l Collegiate Student Loan Tr. 2*, No. 17-05276-LT7, 2020 WL 5552687, at *12 (Bankr. S.D. Cal. Aug. 4, 2020) ("Defendant maintains that TERI did obtain tax-

exempt status from the IRS, but provides no evidence. Defendant explains that Defendant subpoenaed the IRS … but has yet to receive a response. The Court is troubled that Defendant did not even seek this evidence until after it filed its original motion for summary judgment.").

Second, even if TERI was at one point a 501(c) corporation, that would not be not dispositive of the issue. "[T]ax exempt status does not on its own establish nonprofit for the purposes of § 523(a)(8)[(A)](i)." *Id.* at *8.[51] Where a statute employs the word "nonprofit" without defining it as a 501(c), courts conduct an independent inquiry into the entity's character to determine whether it "actually operates as a nonprofit, irrespective of its tax-exempt status." *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473, 478 (1st Cir. 2005).[52] Federal courts cannot abrogate this duty and simply accept a state's classification because issues of dischargeability are governed by federal law. *Grogan v. Garner*, 498 U.S. 279, 283-84 (1991) ("The validity of a creditor's claim is determined by rules of

[51] Congress did not use the term "501(c)" in Section 523(a)(8)(A)(i), though it has done so in a number of statutes, including in the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 101(12A)(B).

[52] *See also id.* at 476 ("We may assume that, when drafting the CROA, Congress was aware of this archetypal language for equating nonprofit status with federal tax-exempt status. … Yet Congress chose a different formulation …. This is strong evidence that Congress did not intend to conflate nonprofit status with section 501(c)(3) tax-exempt status."). The court in *Zimmerman* also looked to the legislative history to determine Congress's intent. *Id.* at 476 n.6. Here, legislative history demonstrates that Congress intended to refer to a "nonprofit institution of higher education."

state law. … Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code.") (citations omitted).[53]

"[N]o clear test for determining when a nonprofit institution is—or is not—a nonprofit institution under section 523(a)(8) of the Bankruptcy Code has been formulated." *TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 927 (1st Cir. 1995) (citing cases). However, in other contexts, "nonprofit status depend[s] primarily on proof that the entity did not distribute profits to stockholders or others[,]" including "those who control it." *Zimmerman*, 409 F.3d at 478. Disbursing profits to "other, for-profit companies" through "suspect transactions" may result in a finding that an organization "did not operate as a nonprofit." *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F. Supp. 2d 254, 278 (D. Mass. 2008), *aff'd sub nom. Zimmerman v. Puccio*, 613 F.3d 60 (1st Cir. 2010).[54] Similarly, when an organization's activities are "designed to enhance the profitability of" a for-profit

[53] Although the meaning of "nonprofit institution" is seldom litigated, "governmental unit" has been litigated for decades, and a state's classification is only one consideration. *In re Marcano*, 288 B.R. 324, 333 (Bankr. S.D.N.Y. 2003) (collecting cases); *TI Fed. Credit Union v. DelBonis*, 72 F.3d 921 (1st Cir. 1995) (concluding credit unions were "governmental units" under Section 523(a)(8)).

[54] *See also Est of Hawaii v. Comm'r of Internal Revenue*, 71 T.C. 1067, 1082 (1979), *aff'd,* 647 F.2d 170 (9th Cir. 1981) (revoking 501(c) status where nonprofit "was simply the instrument to subsidize [] for-profit corporations").

corporation or "benefited private interests," it is not a nonprofit. *P.L.L. Scholarship Fund v. Comm'r of Internal Revenue*, 82 T.C. 196, 200 (1984).

TERI engaged in a number of "suspect transactions" with FMC, and the entities were at times indistinguishable. *In re O'Brien*, 318 B.R. 258, 259 (S.D.N.Y. 2004), *aff'd,* 419 F.3d 104 (2d Cir. 2005) (referencing "First Marblehead Education Resources, Inc. f/k/a The Education Resources Institute a/k/a TERI"). FMC acquired TERI in 2001,[55] and under their "strategic relationship," FMC "acquired TERI's historical database and loan processing operations," and "161 members of TERI's staff became [its] employees." *See* Form 10-K for Fiscal Year 2004 filed by FMC at 12, *available at* https://sec.report/Document/0001047469-04-028806/. FMC also assumed control over TERI's loan origination duties and default management services. *Id.* at 12-13. "During fiscal [year] 2002, 2003 and 2004, processing fees from TERI represented approximately 34%, 23% and 18%, respectively, of [FMC's] total service revenue." *Id.* at 13.[56] Thus, TERI generated profits for FMC, calling into question its nonprofit status.

[55] *First Marblehead Corp. v. House*, 541 F.3d 36, 40 (1st Cir. 2008) (The CEO and Executive Vice President of FMC "both testified that the company … was in a precarious financial situation until the successful acquisition of TERI in 2001[.]")

[56] "An important component of First Marblehead's profitability was [its] relationship with The Education Resources Institute, Inc. ('TERI')." *In re The First Marblehead Corp. Sec. Litig.*, 639 F. Supp. 2d 145, 148-49 (D. Mass. 2009).

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests this Court reverse the Bankruptcy Court's grant of summary judgment, and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 12,979 words.

Dated: October 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals Bankruptcy Appellate Panel for the Ninth Circuit by using the PACER (CM/ECF) system.

I further certify that parties of record to this appeal who either are registered PACER (CM/ECF) users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the PACER (CM/ECF) system.

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